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Supreme Court, U.S.
FILED
JUN 4 2001
CLERK

No. 00-1623

In The

Supreme Court of the United States

David S. Forbes, *et al.*,

Petitioners,

v.

R. Alan Eagleson, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

THE SUMMARY JUDGMENT RECORD CONTAINS ONLY SUSPICIONS OF WRONGDOING 2

THE THIRD CIRCUIT IGNORED *ROTELLA*'S TOLLING REQUIREMENT 6

CONFLICT WITH OTHER CIRCUITS 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page(s)**

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 1,8,10

Fujisawa Pharmaceutical Co. v. Kapoor,
115 F.3d 1332, 1338-39 (7th Cir. 1997) 10

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 8

Morton's Market, Inc. v. Gustafson's Dairy, Inc.,
198 F.3d 823 (11th Cir. 1999), *cert. denied*,
529 U.S. 1130 (2000) 1,8,9

Rotella v. Wood, 528 U.S. 549 (2000) 1,4,5,6,7,8,10

STATUTES

Fed. R. Civ. P. 11 2

INTRODUCTION

Based on a less than forthright depiction of the record and opinions below, defendants strive to establish that the Third Circuit adhered to this Court's directives in *Rotella v. Wood*, 528 U.S. 549 (2000), and followed the same summary judgment rule articulated in the other circuits. Defendants also claim that the Third Circuit's decision is entirely fact-bound and that plaintiffs seek only to contest the lower court's weighing of the evidence.

Defendants are wrong in each respect. The Third Circuit charts a course far removed from the plain meaning of this Court's *Rotella* opinion by ruling, in effect, that *Rotella*'s provision for tolling when a "pattern remains obscure" does not apply even when the pattern's existence is merely suspected but cannot be substantiated because of defendants' fraudulent concealment. In so doing, the Third Circuit adopts an approach to the fraudulent concealment doctrine at summary judgment which diverges sharply from the summary judgment rules articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and applied by the Eleventh Circuit in *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000), and by the Fifth, Seventh, and District of Columbia Circuits in the cases cited in plaintiffs' petition.

In our response to defendants' attempt to redefine what happened below, we first briefly restate the evidence in the record. We then show why the Third Circuit's decision incorrectly applied *Rotella* and demonstrate that the Third Circuit's approach differs dramatically from other circuits'.

THE SUMMARY JUDGMENT RECORD CONTAINS ONLY SUSPICIONS OF WRONGDOING

Regardless of the conclusory statements in defendants' brief, there is no argument about the record on which the court held that summary judgment was warranted. Defendants' submissions consisted of two news article sources of information---the *Sports Illustrated* article and the *Eagle-Tribune* articles---as well as the Garvey report and Alberta labour board petition.

With respect to the press reports based on unverifiable hearsay and anonymous sources, no court has ever held that this type of information---standing alone---is sufficient to start the statute of limitations running in the face of a defendant's fraudulent concealment. A plaintiff's attorney cannot file a lawsuit on the basis of such flimsy information without substantiating the facts through an independent investigation. See Fed. R. Civ. P. 11.

We are left, then, with the Garvey report and the Alberta labour filing as the only remaining bases to support summary judgment. But it is undisputed that the facts alleged in the Alberta petition, by its own statement, were founded exclusively on the *Sports Illustrated* article, without any further substantiation. Whatever merit there was to the filing of that petition, that a Canadian sports agent felt comfortable in basing it entirely on unverified reports in a sports magazine could not possibly establish, as a matter of law, that United States lawyers could, consistent with the law, parrot such allegations in a RICO complaint in the district court. To file such a case would require

substantiation of the sports agent's petition through an independent investigation.

It is also undisputed that that independent investigation---the Garvey report---concluded, as it states, that no information could be obtained to determine whether there was any substance to the *Sports Illustrated* innuendo that Eagleson may have somehow pocketed funds as a result of the team owners' largesse. Further, Garvey's uncontroverted affidavits elaborate on his lack of any basis, as a result of his investigation, to allege, in good faith, that Eagleson had been taking bribes---the very RICO predicate acts asserted here.[1]

In fact, Eagleson and the owners actively lied to the players and otherwise deceived them in order to hide their crimes. For this reason, Eagleson's indictment included mail fraud charges for keeping his illegal activity secret from the

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[1] One of defendants' most serious misrepresentations of the evidence in their brief is their assertion that the Garvey report "expanded on the allegations first made public in the *Sports Illustrated* article" and that the "*essence* of the Garvey Report was that Eagleson's loyalty had in effect been purchased by the NHL in exchange for Eagleson's right to divert revenues from international hockey tournaments to his own personal benefit" (emphasis added) (Def. Br., p. 5). The Garvey report emphatically stated the contrary: that Garvey's efforts to ascertain whether Eagleson had pocketed international hockey revenues had completely failed. In Garvey's words, his investigation produced only a "big goose egg."

players. Plaintiffs' offer of proof from the FBI showed that the information about Eagleson's profiteering from international hockey was unobtainable without the power of compulsory process available to the federal government and the use of the government's vast investigatory resources.

This then is the record on which the Third Circuit's ruling must be judged as to whether it followed the same summary judgment approach as the other circuits and correctly applied this Court's teachings in *Rotella*. Even though, as defendants contend (Def. Br., pp. 12-13), the court of appeals did not expressly "say" that a defendant can obtain summary judgment on the mere showing that a plaintiff was suspicious of wrongdoing, there can be no doubt that the Third Circuit, in fact, affirmed summary judgment on just such a showing, since it is uncontested that the summary judgment record establishes no more than the plaintiffs' suspicion of bribe taking based on news articles.[2]

A careful reading of both lower court opinions establishes why this is so. The Third Circuit relied extensively on the district court's discussion of the record evidence. In its most important part, the Third Circuit quoted from the district court's statement that:

> examination of either the *Sports Illustrated* or *The Eagle-Tribune* article[s] would have

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[2] Indeed, with respect to the core issue of the existence of the predicate acts of bribery, the Third Circuit described Garvey only as having "suspected" this activity, 15a.

> revealed almost every detail of the schemes plaintiffs now allege in their complaint . . .

10a. In other words, both lower courts recognized that the only source of whatever information plaintiffs had about the "schemes plaintiffs now allege" (i.e., the elaborate bribery scheme using the international tournaments) was the press reports.

On this record, as defendants note in their brief, the Third Circuit held, under *Rotella*, that "there was nothing obscure about the actionable conduct [i.e., the pattern] here" and that the "unmistakable historical facts demonstrate that the plaintiffs were aware or should have been aware of the facts supporting their . . . claim." (Def. Br., p. 9).

Thus, it is beside the point to assert, as defendants do, that the Third Circuit did not actually recite that a defendant could obtain summary judgment on the mere showing that press reports may have aroused suspicion of RICO predicate acts. (Def. Br., pp. 12-13). That is precisely what the Third Circuit ruled because the "unmistakable historical facts" consisted solely of information in the news articles and Garvey's failed efforts to verify those reports. Since there is no dispute about these facts comprising the entire summary judgment record, the Third Circuit's decision is not fact bound and this Court is not prevented from reaching the important question of the Third Circuit's divergent approach to summary judgment.

THE THIRD CIRCUIT IGNORED *ROTELLA*'S TOLLING REQUIREMENT

Since the only information plaintiffs had that the owners were bribing Eagleson came from unverifiable news articles, the Third Circuit's holding that "there was nothing obscure about the actionable conduct here," 33a, renders a nullity this Court's directive in *Rotella* that the statute of limitations may be tolled "where a pattern [of racketeering activity] remains obscure in the face of a plaintiff's diligence in seeking to identify it." 528 U.S. at 561. The inevitable effect of the Third Circuit's approach, if permitted to stand, is that the statute will not be tolled if there is any hint of illegal activity even where the source of the information is so unreliable as to prevent plaintiffs from pleading it in a complaint.

This Court could not have intended *Rotella* to be interpreted in this manner. *Rotella* clearly anticipated that a plaintiff would have his suspicion aroused by some disclosure of the existence of the RICO predicate acts and for that reason would be required to engage in "diligence in seeking to identify" the pattern. But *Rotella* also anticipated that the pattern might yet "remain obscure."[3] In other words, the plaintiff has some information that a pattern exists but not enough to plead it, even after conducting a diligent investigation. If the facts in the summary judgment record here are insufficient to invoke this

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[3] This Court's reference in *Rotella* to an "obscure pattern" must have been intended to use "obscure" in its ordinary meaning of "unclear" or "ambiguous" or "shadowy" or "blurred."

Court's concept of "a pattern remaining obscure," then there is virtually no fact situation where *Rotella* will have any application.

By contrast, the Third Circuit effectively interpreted "obscure" to mean only illegal activity about which the plaintiff has no facts and no reason to inquire---not even the kind of preliminary information (referred to by most circuits as "inquiry notice") that requires the plaintiff to investigate. Given the unquestionably limited nature of the defendants' summary judgment showing, the Third Circuit's ruling can mean nothing else.

Defendants contend that because this Court has recently made "it more difficult for civil RICO plaintiffs to survive a statute of limitations defense" (Def. Br., p. 19), there is no public policy reason to overturn the Third Circuit's decision. But in broadening the application of the RICO statute of limitations, there is no indication that this Court intended to bar a plaintiff's claim when a defendant's fraudulent concealment prevented plaintiff from obtaining enough information to plead that claim. On the contrary, this Court made it clear that the established rules providing for equitable tolling continue to apply to RICO cases so that in the appropriate case, a fraudulently concealing defendant will not benefit from his own illegal behavior.

In holding that despite defendants' fraudulent concealment here, mere reports in a sports magazine were sufficient to render the owners' complex bribery scheme not obscure, the Third Circuit ignored the plain directive in *Rotella* and set the stage for future applications of this approach in RICO cases that will effectively obliterate the application of the equitable tolling

doctrine. Plaintiffs' claims will be extinguished by the statute of limitations even though their independent investigation fails to uncover enough information to enable them to plead their cause of action. This Court's recent decisions in *Rotella* and in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), could not have intended such a result.

CONFLICT WITH OTHER CIRCUITS

Only by adopting a summary judgment standard directly at odds with the approach of other circuits in the fraudulent concealment context could the Third Circuit have reached its erroneous interpretation of *Rotella*.

Defendants, however, claim there is no difference between the summary judgment standard used by the Third Circuit and that used by the Eleventh Circuit in *Morton's Market*. But defendants' contention is founded on a misleading use of quotations from the Third Circuit's opinion. First, defendants say that the Third Circuit "carefully articulated the paradigm it intended to use for analysis of the" summary judgment motion in this case and then quote from the opinion as representing this so-called paradigm (Def. Br., pp. 10-11). The part quoted is the Third Circuit's statement that the court must determine "whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim . . ." (Def. Br., p. 11).

But what defendants redacted is the first line of the paragraph which contains the above quote. In establishing its paradigm for deciding the summary judgment motion, the Third Circuit began the paragraph by stating "that the plaintiff has the burden of proving fraudulent concealment," 31a, and never stated that it was imposing any summary judgment responsibility or burden on defendants as required by *Celotex*.

In a disingenuous attempt to convince this Court that there is no conflict between the Third Circuit and the other circuits, defendants contend that the Third Circuit's paradigm, as selectively quoted by them, "is remarkably similar to that" followed by the Eleventh Circuit in *Morton's Market* (Def. Br., p. 14). Defendants' assertion is wholly inaccurate. As plaintiffs demonstrated in their petition, the Eleventh Circuit stated explicitly that "the Dairies have the burden, as the moving parties, to point to undisputed facts in the record which demonstrate conclusively that plaintiffs had notice of their claims . . ." 198 F.3d at 832.

There is no comparable establishment of the defendants' burden by the Third Circuit here. On the contrary, the court stated the inverse of the Eleventh Circuit's rule: that plaintiffs have the burden of proving the fraudulent concealment doctrine and that one of the elements they were required to prove was that they did not have notice of their claims. In other words, instead of requiring defendants to prove, on summary judgment, a positive, i.e., that plaintiffs had notice, the Third Circuit required the plaintiffs to prove a negative: that they did not have notice.

Indeed, had the Third Circuit followed the rule in *Morton's Market* (a rule vigorously urged on it by plaintiffs in their briefs), it would have not required any showing by plaintiffs after defendants supported their summary judgment motion with mere unsubstantiated disclosures in news articles. On the virtually identical showing in *Morton's Market*, the Eleventh Circuit held that defendants had "succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent concealment." 198 F.3d at 833. Like defendants here, the *Morton's Market* defendants showed only that the news reports "*might* have led plaintiffs to inquire, and have made virtually no showing at all regarding

what plaintiffs would have discovered had they done so." *Id.* (emphasis in original).[4]

The other circuits cited by plaintiffs also plainly place the summary judgment burden on defendants to demonstrate, by uncontested facts, that the plaintiffs not only were suspicious and therefore had reason to investigate, but that the investigation would have turned up facts "sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated." *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997).

Thus, defendants mislead the Court by urging, through selective quotation, that the Third Circuit's formulation and application of the summary judgment rules are no different from the Eleventh and other circuits. In fact, the Third Circuit's approach of effectively relieving defendants of their summary judgment burden in this type of case breaks new ground and puts it on a collision course both with the other circuits, and with this Court's pronouncements in *Rotella* and *Celotex*, among others.

CONCLUSION

For the reasons stated above and in their petition, plaintiffs urge this Court to grant their petition for a writ of *certiorari*.

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[4] Of course, here, even though they believe that defendants' summary judgment motion did not require it, plaintiffs made an elaborate showing of their diligent investigation and of the impossibility of discovering the needed facts without compulsory process and far greater resources.

Respectfully submitted,

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Dated: June 1, 2001